

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	Ricky W. Purcell et al.	Examiner:	Aaron Roane
Serial No.:	10/648,590	Group Art Unit:	3739
Filed:	August 25, 2003	Docket:	1443.053US1
Title:	COLD PACK		

PRE-APPEAL BRIEF REQUEST FOR REVIEW

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

The applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a Notice of Appeal. The review is requested for the reason(s) stated below:

Claims 6, 7, 10-12, 15-16, 29-31, 33 and 36 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Dunshee et al. (US 4,462,224) in view of Sabin (US 6,099,555) in view of Avery (US 5,486,206).

Applicant respectfully submits that a *prima facie* case of obviousness has been not established against claims 6, 7, 10-12, 15-16, 29-31, 34 and 36 because (i) Dunshee, Sabin and Avery do not disclose either singularly, or in combination, the invention as claimed in claims 6, 7, 10-12, 15-16, 29-31, 34 and 36; (ii) the Examiner has not provided an adequate motivation to combine Dunshee, Sabin and Avery; and (iii) Avery teaches away from any combination with Sabin and Dunshee.

Dunshee is directed to a three-compartment, instant hot or cold, reusable cold pack for transferring heat to or from an object (see Dunshee Abstract). A solvent, a cold particulate material and a gelling agent are initially segregated within the cold pack by a couple of "single use" seams 24, 26 (see FIGS. 2 and 3 of Dunshee). The cooling (or heating) function of the cold pack is begun by fracturing the seams 24, 26 and mixing the solvent with the gelling agent and the cold particulate material.

Dunshee does not disclose (i) "a fibrous layer within said enclosure, said fibrous layer including fibers that retain said endothermic solution within said enclosure to spread said endothermic solution throughout the interior of said enclosure" as recited in claim 6; or (ii) "an

absorbent core within said enclosure, said absorbent core being formed at least partially of fibers which retain said endothermic solution within said enclosure to spread said endothermic solution throughout the interior of said enclosure” as recited in claim 12. Applicant respectfully notes that Dunshee provides no teaching or suggestion as to an absorbent core that retains an endothermic solution because the cooling gel which is formed upon mixing in Dunshee is actually the endothermic solution itself. Therefore, Dunshee does not disclose an absorbent core that retains the endothermic solution as indicated by the Examiner because nothing in the enclosure retains the cooling gel to spread the cooling gel throughout the enclosure.

Sabin is directed to a cold pack that includes a gelling agent which is adhered as a permeable coating to a particulate “cold generating” material (see, col. 1, lines 49-52 of Sabin). The combined gelling agent and cold particulate material are initially segregated from a liquid within the cold pack by a “single use” frangible membrane (see, col. 2, lines 1-11 of Sabin). The cooling function of the cold pack is begun by fracturing the membrane and mixing the liquid with the combined gelling agent and cold particulate material.

Sabin does not disclose (i) “a fibrous layer within said enclosure, said fibrous layer including fibers that retain said endothermic solution within said enclosure to spread said endothermic solution throughout the interior of said enclosure” as recited in claim 6; or (ii) “an absorbent core within said enclosure, said absorbent core being formed at least partially of fibers which retain said endothermic solution within said enclosure to spread said endothermic solution throughout the interior of said enclosure” as recited in claim 12. Applicant respectfully notes that Sabin provides no teaching or suggestion as to an absorbent core that retains an endothermic solution because the cooling gel which is formed upon mixing in Sabin is actually the endothermic solution itself. Therefore, Sabin does not disclose an absorbent core that retains the endothermic solution as indicated by the Examiner because nothing in the enclosure retains the cooling gel to spread the cooling gel throughout the enclosure.

Avery is directed to a “reusable” thermal pack that includes one or more pads which encapsulate a gel (see, col. 1, lines 53-57 of Avery). The gel in Avery includes a fibrous, flaked or shredded material (see, col. 2, lines 1-2 of Avery).

Avery does not disclose (i) “a fibrous layer within said enclosure, said fibrous layer including fibers that retain said endothermic solution within said enclosure to spread said

endothermic solution throughout the interior of said enclosure” as recited in claim 6; or (ii) “an absorbent core within said enclosure, said absorbent core being formed at least partially of fibers which retain said endothermic solution within said enclosure to spread said endothermic solution throughout the interior of said enclosure” as recited in claim 12. Applicant respectfully notes that fibrous material disclosed in Avery does not retain an endothermic solution to spread the endothermic solution. In addition, the drawings in Avery illustrate that the fibers in Avery are not part of any type of structure (i.e., like a “core”) such that Avery does not disclose an absorbent core.

I. The Combination of Dunshee, Sabin and Avery Does Not Teach Every Element of Claims 6, 7, 10-12, 14-16, 29-31, 34 and 36

As discussed above, none of the cited references teaches or suggests either singularly, or in combination, (i) “a fibrous layer within said enclosure, said fibrous layer including fibers that retain said endothermic solution within said enclosure to spread said endothermic solution throughout the interior of said enclosure” as recited in claim 6; or (ii) “an absorbent core within said enclosure, said absorbent core being formed at least partially of fibers which retain said endothermic solution within said enclosure to spread said endothermic solution throughout the interior of said enclosure” as recited in claim 12. Applicant again respectfully submits that Dunshee, Sabin and/or Avery do not teach or suggest an absorbent core, especially an absorbent core (or layer) that includes fibers which retain an endothermic solution.

II. There is No Motivation or Suggestion to Combine Dunshee, Sabin and Avery

The Office Action must provide specific, objective evidence of record for a finding of a suggestion or motivation to combine reference teachings and must explain the reasoning by which the evidence is deemed to support such a finding. *In re Sang Su Lee*, 277 F.3d 1338, 61 U.S.P.Q.2D 1430 (Fed. Cir. 2002). The Final Office Action states at pages 4-5 that

“it would have been obvious to one having ordinary skill in the art to modify the invention of Dunshee et al., as taught by Sabin, to mix liquid (solvent), solute and gelling agent together as an alternate cooling modality and in order to provide a relatively comfortable cooling device, and as further taught by Avery, to provide the gel with a fibrous material in order to increase gel viscosity and heat capacity.”

Applicant respectfully traverses these assertions and notes that the Examiner provides no support for such assertions. In addition, Applicant submits that the statements are mere

conclusory statements of subjective belief because the statements are similar to the statements made by the Examiner and board in *In re Lee*, 277 F.3d 1338 (Fed. Cir. 2002).

“With respect to Lee’s application, neither the examiner nor the Board adequately supported the selection and combination of the Nortrup and Thunderchopper references to render obvious that which Lee described. The examiner’s conclusory statements that ‘the demonstration mode is just a programmable feature which can be used in many different devices for providing automatic introduction by adding the proper programming software’ and that ‘another motivation would be that the automatic demonstration mode is user friendly and it functions as tutorial’ do not adequately address the issue of motivation to combine. This factual question of motivation is material to patentability, and could not be resolved on subjective belief and unknown authority. It is improper, in determining whether a person of ordinary skill in the art would have been lead to this combination of references, simply to use ‘[use] that which the inventor taught against its teacher.’ *W.L. Gore V. Garlock, Inc.*, 721 F. 2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983).” *Lee*, at 1343, 1344.

Applicant respectfully submits that the only teaching or suggestion relating to (i) “a fibrous layer within said enclosure, said fibrous layer including fibers that retain said endothermic solution within said enclosure to spread said endothermic solution throughout the interior of said enclosure” as recited in claim 6; or (ii) “an absorbent core within said enclosure, said absorbent core being formed at least partially of fibers which retain said endothermic solution within said enclosure to spread said endothermic solution throughout the interior of said enclosure” as recited in claim 12 is found in Applicant’s disclosure. Applicant respectfully notes that the Office Action has not provided objective evidence that there is an adequate motivation to combine all three of the cited references.

III. Avery teaches away from any combination with Dunshee and Sabin

A factor cutting against a finding of motivation to combine or modify the prior art is when the prior art teaches away from the claimed combination. A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path the applicant took. *In re Gurley*, 27 F.3d 551, 31 USPQ 2d 1130, 1131 (Fed. Cir. 1994); *United States v. Adams*, 383 U.S. 39, 52, 148 USPQ 479, 484 (1966); *In re Spinnoble*, 405 F.2d 578, 587, 160 USPQ 237, 244 (C.C.P.A. 1969); *In re Caldwell*, 319 F.2d 254, 256, 138 USPQ 243, 245 (C.C.P.A. 1963).

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Dunshee and/or Sabin because Avery teaches a "reusable" thermal pack (see Avery at col. 1, lines 53 and 56). In contrast, Dunshee and Sabin relate to a one-time use cold pack where the liquid and the cold particulate material are initially segregated and then mixed together to start the endothermic reaction. Once the liquid and the cold particulate material are mixed together in the cold packs disclosed in Dunshee and Sabin, the endothermic chemical reaction can not be carried out again. Applicant respectfully submits that based on the reusable thermal pack teachings of Avery, one of ordinary skill in the art would look away from the one-time use devices that are disclosed in Dunshee and Sabin.

Reconsideration and allowance of claims 6, 7, 10-12, 14-16, 29-31, 34 and 36 are respectfully requested.

The Examiner is invited to telephone the below-signed attorney at (262) 646-7009 to discuss any questions which may remain with respect to the present application. If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743.

Respectfully submitted,
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Date 6-26-06 By Andrew Peret
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CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence is being filed using the USPTO's electronic filing system EFS-Web, and is addressed to: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on this 24 day of June, 2006.

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